Supreme Court, U. S.
FILED
OCT 18 1973
MICHAEL RODAK, JR., CLERK

No. 73-214

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA,

Respondent,

vs.

CHRIS CARDI,

Petitioner.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ALBERT E. JENNER, JR.
THOMAS P. SULLIVAN
ALAN L. METZ
Attorneys for Petitioner

Of Counsel:
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-214

UNITED STATES OF AMERICA,
Respondent,

vs.

CHRIS CARDI,
Petitioner.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INTRODUCTION

Constitutional Questions:

The Solicitor General erroneously states that no constitutional question is presented by this petition. The petition and record demonstrate denial of rights guaranteed petitioner by the Fifth and Sixth Amendments: namely, the right to a fair trial (Fifth Amendment, due process clause); before an impartial, unprejudiced jury (Sixth Amendment); the right to be confronted with the witnesses against him (Sixth Amendment) and to be sentenced, if guilty, on premises unprejudiced by improper consideration of jury verdicts and evidence with respect thereto that should never have reached the jury (Fifth and Sixth Amendments).

Alleged Guilt On Counts 1 And 3.

The Solicitor General also states that guilt under counts 1 and 3 is clear, or is tacitly conceded. Quite the contrary is true. When limited to counts 1 and 3, especially when count 1 is excised of its inclusion of counts 5 and 7 and the prejudicial evidence admitted thereunder, the case is extremely close.

Furthermore, the evidence and verdict under counts 1 and 3 were severely tainted by the failure of the learned trial judge to withdraw counts 5 and 7 from the jury and to instruct the jury to disregard, as to petitioner, all of the evidence admitted under those counts. Also, the verdicts as to counts 1 and 3 were constitutionally impermissible in light of the learned trial judge's prejudicial ruling on admission of evidence as to petitioner under counts 5 and 7 and his instructions to the jury to consider "all the evidence" (R. 709), "all the facts and circumstances surrounding the case" (R. 717), as well as "the actions and declarations of all the alleged conspirators-participants." (R. 718).

The statement of facts presented by the Government in its Answering Brief* (pp. 2-4) demonstrates the true nature of this case. One paragraph of the Solicitor General's fact statement refers to petitioner; the remainder to co-defendant Cimmino. At trial, the Government counsel, we respectfully suggest, recognized that the evidence against petitioner alone would not support a conviction. The Government needed and found a way to tie petitioner to the evidence against Cimmino. That method was to

* We note that the Solicitor General has neither complied with Supreme Court Rule 24 nor served notice on Petitioner of any enlargement of time to file his brief.

use the taped telephone conversation and other evidence erroneously admitted over objection under Counts 5 and 7 and successfully to oppose the giving of a limiting instruction both as to the taped conversation and the other evidence admitted under Counts 5 and 7.

Having presented the substance of the taped conversation to the jury three times—once through Moore's testimony, once by playing the tape for the jury, and once by giving a transcript of the tape to the jury—the Government's statement (Gov't. Brief p. 4) that the tape may not even have referred to Petitioner is patent nonsense. When the other evidence erroneously admitted against petitioner on counts 5 and 7 was added, it is clear that the jury was overwhelmed by the prejudice.

I

THE COURT OF APPEALS CLEARLY VIOLATED THE RULE OF LUTWAK V. UNITED STATES AND KRULEWITCH V. UNITED STATES.

The rule of *Lutwak* v. *United States,* 334 U.S. 604 (1953) and *Krulewitch* v. *United States,* 336 U.S. 440 (1949) is clear: admission of a post-conspiracy statement *without limiting instructions respecting its inadmissibility to a particular defendant is, ipso facto, prejudicial, reversible error.* Equally, if not more so, admission of other evidence under counts 5 and 7 which should have been excluded as to petitioner under proper instructions is likewise *ipso facto* prejudicial, reversible error.

The Government argues (Brief p. 5) that the rule of *Lutwak* and *Krulewitch* was not violated because a conspiracy had been established and had not been terminated prior to the November 28, 1970 taped telephone conversation. This argument totally disregards the holding of the Court of Appeals as to the nature and scope of the conspiracy of which petitioner was found (erroneously we contend) to be a part.

There was no evidence presented at trial connecting petitioner to a comprehensive, ongoing conspiracy to sell narcotics. Rather, the Court of Appeals found that the evidence supported a finding of a conspiracy limited to the facilitation of a single transaction:

> "The jury could legitimately infer from Cardi's statement that he knew of the plan between Cimmino, Moore and Weinstein to sell narcotics and voluntarily assisted and facilitated its accomplishment *to the ex-*

> *tent of the September 25 sale.*" (A. 12-13; emphasis added.)*

The Court also stated:

> ". . . Cardi's participation in the conspiracy to sell drugs was established only so far as the September 25 sale was concerned. The conspiracy, so far as Cardi was concerned, ended at that time." (A. 14).

Because the conspiratorial agreement of petitioner, as found by the Court of Appeals, was limited to the facilitation of a single transaction, petitioner was not required to take affirmative steps to terminate his involvement. As stated in *Hyde* v. *United States,* 225 U.S. 347 (1912), one of the cases relied upon by the Government, (Brief p. 6), a distinction must be drawn between an ongoing and a limited conspiracy (225 U.S. at 369):

> "Men may have lawful and unlawful purposes, temporary or enduring. The distinction is vital and has different consequences and incidents. The conspiracy accomplished or having a distinct period of accomplishment is different from one that is to be continuous."

The court in *Hyde* held that a member of an ongoing conspiracy must take affirmative action to withdraw but indicated that a limited conspiracy is terminated as to its members when the limited objective of the conspiracy is accomplished. Furthermore, the following cases make clear that a conspiracy terminates on the date that the

---

* As argued in the Petition and this Reply, the jury reached a verdict of guilt on Count 1 because of the constitutional taint of the prejudicial, reversible errors of the trial judge under Counts 5 and 7.

central objective of the conspiracy is achieved. *Lutwak* v. *United States,* 344 U.S. 604, 616-17 (1953); *Krulewitch* v. *United States,* 336 U.S. 440, 442 (1949); *Fiswich* v. *United States,* 329 U.S. 211, 216-17 (1946), *Mosley* v. *United States,* 285 F.2d 226, 228 (5th Cir. 1960) and *United States* v. *Hickey,* 360 F.2d 127, 140 (7th Cir. 1966). The central objective of the conspiracy of which petitioner was found to be a part was the facilitation of a single sale of heroin. That conspiracy terminated, as the Court of Appeals has stated, with the completion of that sale on September 25, 1970.

The Government's position (Brief p. 5n.5) that the conspiracy of which petitioner was found to be a part can be considered ongoing for purposes of establishing the conspiracy but temporary for purposes of establishing substantive liability for later transactions is unsupported by any authority or by any references to the record. The statement is sheer speculation.

As was held by the Court of Appeals, petitioner was a member of a limited conspiracy which terminated as of September 25, 1970. Accordingly, under the rule of *Lutwak* and *Krulewitch,* the statement of Cimmino, made after the termination of this alleged conspiracy, could not have been made in furtherance thereof and was inadmissible as against petitioner. The learned trial court's refusal, despite the urging of petitioner's counsel, to instruct the jury to consider the taped conversation (as well as all other evidence under counts 5 and 7) only as to Cimmino contaminated the verdict.

The only possible means of rectification is a new trial.

II.

THE ADMISSION OF THE NOVEMBER 28 CONVERSATION AND OTHER EVIDENCE UNDER COUNTS 5 AND 7 WAS REVERSIBLE ERROR.

The Government's statement (Brief pp. 6-7) that even if the admission of the November 28 statement was erroneous, the error was not so prejudicial as to require reversal and remandment for new trial, ignores the plain facts of this case.

The Government contends that the conversation was not inculpatory of petitioner and at most was simply cumulative.* Even if this statement were correct, it totally misses the point. The point is not what weight *should* have been given this improperly admitted conversation, but rather what weight *was* given to it and other erroneously admitted evidence by the jury; and the effect all that evidence had on the jury.

The weight given by the jury—not only to the tapes but also the highly prejudicial evidence on counts 5 and 7 which the Court of Appeals correctly held should have been withdrawn from the jury but to which the trial judge directed the attention of the jury and Government counsel emphasized in closing argument—is demonstrable. There simply is no other way to explain the jury's verdict of guilty on the October 1 and 15 sales (counts 5 and 7). The jury was overwhelmed, and its objectivity seriously impaired by this mass of inadmissible evidence.

---

* Even if the conversation was cumulative, it was harmful to admit it in that it served improperly to corroborate prior testimony. This was the holding in *Laughlin* v. *United States*, 344 F.2d 187, 192-93 (D.C. Cir. 1965) where the Court reversed even though limiting instructions had been given.

The trial judge instructed the jury, over the objections and motions of petitioner, to consider "all the evidence" (R. 709, 710, 712, 721); "all of the facts and circumstances surrounding the case" (R. 717); as well as "the actions and declarations of all of the alleged conspirators-participants . . ." (R. 718). The trial judge submitted *all* counts to the jury with instructions that the conspiracy (count 1) embraced the period "September 1st, 1970 and continuing thereafter until on or about 24—February 24, 1971" (R. 712) and that Count 1 realleged "what is charged in the remaining counts of the indictment . . ." (R. 713). The jury was told that if it found a continuing conspiracy *as charged in count 1* then "the acts and *declarations* of any other member of such conspiracy, in or out of the defendant's presence, done in furtherance of the objects of the conspiracy *and during its existence, may be considered as evidence against such defendant.*" (R. 719; emphasis added).

There is no credible reason to believe, especially since both a limiting instruction as to the tapes and a motion for withdrawal of Counts 5 and 7 as to petitioner was refused, that the jury did not consider and was not materially influenced by the prejudicial evidence in reaching its verdict on Counts 1 and 3. The Government's belated attempt to belittle the significance of the taped telephone conversation flies in the face of its own triple introduction of the Cimmino conversation at trial; its own reliance and emphasis on the conversation during closing argument (R. 706-08) and the sentencing hearing (A. 18); the trial judge's reliance on the conversation in imposing sentence (A. 19); and the jury's demonstrable reliance in convicting on Counts 5 and 7.

The cumulative effect of submitting to the jury Counts 5 and 7, on which there was absolutely no admissible evidence as to Cardi, and allowing the members of the jury not only to hear the taped telephone conversation of November 28, 1970, but to afford them a reporter's transcript thereof, and to consider as to Counts 1 and 3, the evidence admitted as to all other Counts, gave unwarranted credence to the Government witnesses and unalterably prejudiced petitioner.

Counts 1 and 3 were seriously and prejudicially tainted by these errors thus denying defendant his constitutionally guaranteed right to a fair trial by an unprejudiced, impartial jury.

III.

PETITIONER WAS SENTENCED IN VIOLATION OF UNITED STATES v. TUCKER.

In imposing sentence, the trial judge was improperly influenced by the November 28, 1970 conversation, which was erroneously admitted, by other prejudicial and inadmissible evidence admitted against petitioner under Counts 5 and 7, and by the jury verdicts on those Counts. The learned trial judge sentenced petitioner on Counts 1, 3, 5 and 7 to the same imprisonment as he did with respect to defendant Cimmino who was found guilty of a continuing conspiracy extending into the months of October and November (Counts 5 and 7) as to which the Court of Appeals has held petitioner did not participate.

We respectfully submit that the sentences as to Petitioner were unduly harsh in light of the material difference in the involvement of Cardi and Cimmino. And, this is especially true in light of the reversal by the Court of

Appeals of counts 5 and 7 and the favorable verdicts of the jury as to Petitioner (only) on counts 2, 4, and 6 whereas Cimmino was found guilty on all seven counts.

The Government argues (Brief p. 8n.11) that petitioner's reliance on *McGee* v. *United States*, 462 F.2d 243 (2d Cir. 1972) is misplaced. In *McGee*, the court relied upon *Tucker** to require resentencing in a situation where the trial court's original sentencing determination could have been influenced by defendant's conviction on a count subsequently reversed. That is precisely the situation presented by the case at bar.

The Government contends that *McGee* is distinguishable because there the reversed count was the most serious of the four counts under which *McGee* was prosecuted, whereas in the case at bar the conspiracy conviction was affirmed and two of the substantive count convictions were reversed. Furthermore, the Government contends that this case is similar to cases cited in *McGee* where resentencing is not required.

In fact, the case at bar is not akin to the case in which conviction on a substantive count has little sentencing impact upon the more serious conspiracy count. Reversal of the convictions on counts 5 and 7 has tremendous significance. The reversal was based on a finding by the

---

* The Solicitor General advances the immaterial observation that we did not cite *Tucker* in our briefs and petition for rehearing in the Court of Appeals. The fact is, however, that we argued the point in the Court of Appeals in moving, in the alternative, for remandment for resentencing. (Court of Appeals brief pp. 49-59. Petition for Rehearing, pp. 16-18) The Court of Appeals denied the motion. (See Court of Appeals Order in the Record which is not presently available to petitioner's counsel.)

Court of Appeals that petitioner was involved in an extremely limited conspiracy, a conspiracy considerably different from the one considered by the trial court. As we have previously stated, the Court of Appeals determined that petitioner was part only of a conspiracy to facilitate the September 25 sale; that as to petitioner the conspiracy terminated with the accomplishment of that sale; and, that there was no evidence to support the view that petitioner even knew of the October 1 and 15 sales underlying counts 5 and 7.

It is apparent that the reversal on counts 5 and 7 stems from a recognition by the Court of Appeals that petitioner was *not* shown to be the "focal point" of an ongoing conspiracy to import and sell narcotics as stated by the trial court. (A. 18-19).

The holding of the Court of Appeals relates directly to the validity of the trial court's reliance on inferences drawn from the jury's verdict. As stated in *United States* v. *Needles*, 472 F.2d 652, 657 (1973) (quoting from *United States* v. *Malcolm*, 432 F.2d 809, 816 (2d Cir. 1970) and citing *Tucker*):

> "material false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process."

The learned trial judge imposed sentence under the influence of material, unwarranted assumptions as to the nature and scope of the conspiracy in which petitioner was found to be involved. These assumptions were based not only on the erroneous premise that petitioner was involved in a conspiracy that continued beyond September 25th, but also on inferences the judge erroneously drew from all of the evidence, including the improperly considered November 28 taped conversation.

For these reasons, as well as those set forth in the petition for certiorari, the cause should be remanded for review and reconsideration of petitioner's sentence in light of the determinations of the Court of Appeals and in conformity with the rule established in Tucker.*

CONCLUSION

This is an extraordinary case. Petitioner is seeking his constitutional right to a fair trial by an impartial and unprejudiced jury. Petitioner seeks only to be tried on evidence pertinent to the limited issues presented by counts 1 and 3, uninhibited by the extraneous and inadmissible evidence introduced against him at the trial of this case. These are rights guaranteed him by the Constitution but which were denied him at trial.

Respectfully submitted,

ALBERT E. JENNER, JR.
THOMAS P. SULLIVAN
ALAN L. METZ
Attorneys for Petitioner

Of Counsel:
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350
October 18, 1973

---

* This request is alternative to the major thrust of the Petition, viz., that petitioner was necessarily denied his federally protected constitutional right to a fair trial under Counts 1 and 3 before a fair and unprejudiced jury, and that therefore, the cause should be remanded for new trial as to those counts.